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THE TRUMP ADMINISTRATION SHOULD HAVE ATTORNEY WHISTLEBLOWERS

Carliss N. Chatman*

In the *Godfather* trilogy, lawyers do most of their work outside of the courtroom.¹ The family's lawyer, Tom Hagen, has the title of consigliere, serving as the boss's right-hand man.² He is legal counsel and also assists with business management and planning.³ This includes operation of the family's criminal enterprise.⁴ In *The Godfather*, a lawyer is a fixer, an enforcer, and a collaborator.⁵ This conceptualization of the attorney role is not only unethical, it is illegal.⁶ Yet, it is the role currently assumed by our Attorney General, William "Bill" Barr, and White House Counsel, Pasquale "Pat" Cipollone. Although both men took an oath to represent the people and to uphold the Constitution,⁷ and are bound by the rules of professional conduct in the jurisdictions where they are licensed,⁸ they

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1. See *THE GODFATHER* (Paramount Pictures 1972); *THE GODFATHER PART II* (Paramount Pictures 1974); *THE GODFATHER PART III* (Paramount Pictures 1990).

2. *THE GODFATHER*, *supra* note 1; *THE GODFATHER PART II*, *supra* note 1.

3. *THE GODFATHER*, *supra* note 1; *THE GODFATHER PART II*, *supra* note 1.

4. *THE GODFATHER*, *supra* note 1; *THE GODFATHER PART II*, *supra* note 1.

5. *THE GODFATHER*, *supra* note 1; *THE GODFATHER PART II*, *supra* note 1.

6. MODEL RULES OF PRO. CONDUCT r. 1.6, 8.4(c) (AM. BAR ASS'N 2018); Carliss Chatman, *Myth of the Attorney Whistleblower*, 72 SMU L. REV. 669, 677 (2019).

7. See U.S. CONST. art. II, § 1, cl. 8 (requiring the President to swear an oath to uphold the Constitution); *id.* art. VI, cl. 3 (requiring senators, representatives, state legislators, and state executives to swear to uphold the Constitution); 5 U.S.C. § 3331 (2020) (requiring civil servants and members of the military to swear to defend and remain faithful to the Constitution). The full oath of office states: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." *Id.*

8. William Barr is licensed in New York and Washington, D.C., and Pat Cipollone is licensed in Illinois and Washington, D.C. *Attorney Search*, N.Y. ST. UNIFIED CT. SYS., <https://iapps.courts.state.ny.us/attorney/AttorneyDetails?attorneyId=CjwhGUrdlswdjbxCrkO8XQ%3D%3D> (last updated June 14, 2020); *Find a Member*, D.C. BAR, <https://join.dcbbar.org/eweb/DynamicPage.aspx?Site=dcbbar&WebCode=FindMemberResults> (last

instead work on behalf of Donald J. Trump. The People's attorneys are beholden to the President.

When John Dean used his role as White House Counsel to serve as a consigliere to Richard Nixon, assisting with the cover-up of the Watergate scandal, his participation landed him in jail and led to a change to the ethical rules governing lawyers.⁹ John Dean served as White House Counsel for President Richard Nixon from July 1970, until April 1973.¹⁰ He assisted in the cover-up of the Watergate scandal and subsequently chose to blow the whistle, testifying before Congress as a witness.¹¹ On October 19, 1973, he pleaded guilty to one count of violation of 18 U.S.C. § 371, conspiracy to obstruct justice.¹² On August 3, 1974, he was sentenced to a term of one to four years.¹³ Dean began his term on September 3, 1974, and was released on January 8, 1975, pursuant to an order reducing the sentence to time served.¹⁴ Dean was also disbarred.¹⁵ Dean's actions led to changes in ethics rules for lawyers, starting with the formation of the American Bar Association (ABA) Commission on Evaluation of Professional Standards, which eventually resulted in adoption of the Model Rules of Professional Conduct in August of 1983, which replaced the Model Code of Professional Responsibility that had been in place since 1969.¹⁶

These consequences for conspiracy with a client happened to Dean under the ethical rules existing at the time. John Dean was present at every stage of the Watergate scandal.¹⁷ He participated in meetings and directly assisted in the concealment of evidence.¹⁸ After realizing he may be used as a scapegoat, Dean obtained counsel and cooperated with the authorities, pleading Fifth Amendment immunity in initial court proceedings, then testifying about his involvement before the Senate.¹⁹ Assisting a client in the commission of a crime has always been considered a crime and outside of the protection of privilege.²⁰ Dean has admitted that during his time at the White House, he believed Richard Nixon was his client.²¹ Under the modern Model Rules of Professional Conduct,

visited Aug. 7, 2020); *Lawyer Search*, ATT'Y REGISTRATION & DISCIPLINARY COMM'N SUP. CT. ILL., <https://www.iardc.org/ldetail.asp?id=867365888> (last visited Aug. 7, 2020).

9. Mark Curriden, *The Lawyers of Watergate: How a "Third-Rate Burglary" Provoked New Standards for Lawyer Ethics*, 98 A.B.A. J. 36, 42 (2012) (explaining that after Watergate, legal ethics became a required class, state bar examinations added an extra section on ethics, and nearly every state added continuing legal education programs focused on ethics and professional conduct); John W. Dean & James Robenalt, *The Legacy of Watergate*, 38 LITIG. 19, 23-24 (2012); WATERGATE SPECIAL PROSECUTION FORCE, REPORT app. A at 155 (1975).

10. Curriden, *supra* note 9, at 41; Dean & Robenalt, *supra* note 9, at 23.

11. Dean & Robenalt, *supra* note 9, at 21-22.

12. Curriden, *supra* note 9, at 41; *see generally* 18 U.S.C. § 371 (2020).

13. Curriden, *supra* note 9, at 41.

14. WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 9, at 155.

15. Curriden, *supra* note 9, at 43.

16. *Id.* at 42.

17. *See* WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 9.

18. *See* Curriden, *supra* note 9, at 40.

19. *Id.* at 41.

20. *See* FED. R. EVID. 501; MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

21. Curriden, *supra* note 9, at 40.

attorneys are advocates for their clients,²² but they are also officers of the court.²³ They face discipline and possible criminal prosecution when they collaborate with their clients to commit crime and fraud.²⁴ The Model Rules also protect attorneys when they reveal their clients' conduct, breaking the sacred bond between attorney and client to prevent a client's ongoing scheme from causing additional harm.²⁵ The combination of penalties for failure to disclose and protection for disclosure should motivate attorneys in the Trump Administration to join the ranks of whistleblowers. So far, it has not.

As I discuss in my previous work, *Myth of the Attorney Whistleblower*, this phenomenon is not unique to the government's attorneys.²⁶ Attorneys simply do not avail themselves of the ability to mitigate harm by blowing the whistle on trusted clients.²⁷ Instead, the measures aimed at promoting attorney disclosure create an environment in which attorneys can either bury their heads in the sand or rely on the silos of expertise to avoid meeting the threshold of knowledge required for attorney whistleblowing.²⁸ What is notable about Barr and Cipollone is that they appear to operate fully informed, breaking the silos of expertise, and yet continue to advance the agenda of the Trump Administration without regard for their ultimate clients, American citizens.²⁹

The issues of confidentiality and attorney disclosures have been the subject of debate since the 1977 ABA Commission on Evaluation of Professional Standards.³⁰ Nixon's lawyers argued they were ethically bound to honor the secrets of their client even if they were involved in illegal activity—an argument that became known as the "Watergate defense."³¹ Despite this defense, the idea of allowing disclosure of confidential information did not gain traction until 2002 when the corporate financial scandals of Enron and Worldcom shed light on attorney involvement in client wrongdoing.³² Following the collapse of Enron, Congress passed the Sarbanes-Oxley Act, which responds to the problem of attorney participation in fraud by imposing a structure of up-the-chain and external reporting on attorneys practicing before the SEC.³³ The ABA also updated the ethical rules for all attorneys in 2003 by revising Model Rules 1.6 and 1.13 to enact a similar structure.³⁴

22. See MODEL RULES OF PRO. CONDUCT pmbll., paras. 1-5 (AM. BAR ASS'N 2018); see also Chatman, *supra* note 6, at 678.

23. See MODEL RULES OF PRO. CONDUCT r. 1.2(d), 3.3 (AM. BAR ASS'N 2018).

24. See *id.* r. 1.2(d), 1.6(b).

25. *Id.* r. 1.6(b).

26. See Chatman, *supra* note 6, at 681-83.

27. *Id.* at 683.

28. *Id.* at 684.

29. For a discussion of the cognitive and behavioral motivations, see Anna Spain Bradley, *Cognitive Competence in Executive-Branch Decision Making*, 49 CONN. L. REV. 713, 718 (2017) ("When a President or his administration blunders, it occurs at the hands of an individual or set of individuals who made the wrong choice.")

30. Curriden, *supra* note 9, at 42.

31. *Id.*

32. *Id.* at 43.

33. Chatman, *supra* note 6, at 671-72.

34. *Id.* at 672.

State bar associations take the prohibition on attorney collusion very seriously. Attorneys are permitted to break confidentiality: (1) to prevent death or bodily harm; (2) to prevent a client from using the attorney's services to commit a crime or fraud that will result in substantial injury to the financial interests of another; or (3) when disclosure will "prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud" that used the lawyer's services.³⁵ Similarly, the attorney-client privilege does not protect communications between attorneys and clients that are made with the intention of committing a crime or fraud.³⁶ In other words, attorneys may blow the whistle on their clients when their services are used to further a scheme that results in harm to the financial interests of others, and privilege does not exist when attorneys and clients communicate to commit crimes.³⁷

Following another impeachment of a president,³⁸ based on scenarios that damage our nation's position internationally and shake the foundations of our democracy and economy, it is clear that the participation in these schemes by Rudy Giuliani (President Donald Trump's personal counsel), Bill Barr (the Attorney General), and Pat Cipollone (the White House Counsel) invoked the exceptions to confidentiality and privilege. If we consider Donald Trump to be the client of the Justice Department, the White House Counsel, and Rudy Giuliani, communications about conduct causing harm to the financial interest of the country, or in furtherance of a crime or fraud, can be, and should be, disclosed.³⁹ To avoid John Dean's fate, these attorneys should be whistleblowers.⁴⁰ Instead, these attorneys continue to participate in a scheme that, while it has not resulted in removal of the President, has resulted in criminal convictions for others involved.

Through the impeachment proceedings, we learned that Rudy Giuliani intervened in international matters when government actors refused to do Donald Trump's bidding, or when Donald Trump wanted to use his position to advance his personal agenda.⁴¹ Four associates of Rudy Giuliani, who allegedly assisted him with finding information in Ukraine about the Bidens for Donald Trump's benefit, have been arrested.⁴² Giuliani is also the subject of an independent federal investigation.⁴³

35. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

36. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (AM. LAW INST. 2000).

37. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (Am. L. Inst. 2000).

38. H.R. Res. 755, 116th Cong. (2019).

39. See, e.g., Dean & Robenalt, *supra* note 9, at 25 (summarizing the proposed course of conduct under current rules of professional conduct); WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 9.

40. See generally Dean & Robenalt, *supra* note 9, at 23-25.

41. H.R. REP. NO. 116-335, at 4 (2019).

42. See Sealed Indictment at 2, United States v. Lev Parnas, No. 1:19-cr-00725-JPO (S.D.N.Y. Oct. 9, 2019), ECF No. 1.

43. Caroline Kelly, *Washington Post: Feds Advanced Giuliani Investigation As Impeachment Wrapped and DOJ Reviewed His Ukraine Tips*, CNN (Feb. 14, 2020, 8:44 PM),

There are numerous examples of Bill Barr using his position as Attorney General to conceal Donald Trump's activity. Barr's Justice Department worked to conceal the whistleblower report about the July phone call between Donald Trump and Ukrainian President Volodymyr Zelensky.⁴⁴ Barr has used his position to investigate those who oppose or challenge Donald Trump, including an investigation into the origins of the Mueller Report.⁴⁵ He has also interfered with investigations of those who support Trump.⁴⁶ Barr's actions inspired alumni of the Department of Justice to write a letter condemning his interference in the administration of justice.⁴⁷

Pat Cipollone authored a letter refusing to cooperate in the impeachment inquiry filled with uncolorable defenses and improperly stating standards of law.⁴⁸ His goal appeared to be to advocate for the outcome that enables continued concealment of Trump's questionable activity, not for the position that is most beneficial to the country.⁴⁹ In his opening remarks at the impeachment hearing, Cipollone stated that Republicans were not allowed into the Sensitive Compartment Information Facility (SCIF) or allowed to participate in impeachment proceedings, even though Republicans were allowed into the SCIF and Republican committee members heard impeachment witness testimony.⁵⁰ Many believe he violated Rule 3.3 by blatantly lying to the Senate during the

<https://www.cnn.com/2020/02/14/politics/federal-prosecutors-advance-rudy-giuliani-investigation/index.html> [<https://perma.cc/68GJ-UBXT>].

44. Devlin Barrett, Matt Zaposky, Josh Dawsey & Shane Harris et al., *Whistleblower Claimed that Trump Abused His Office and that White House Officials Tried to Cover It Up*, WASH. POST (Sept. 26, 2019, 5:11 PM), https://www.washingtonpost.com/national-security/house-intelligence-committee-releases-whistleblowers-complaint-citing-trumps-call-with-ukraines-president/2019/09/26/402052ee-e056-11e9-be96-6adb81821e90_story.html [<https://perma.cc/S2VC-8YZV>].

45. Peter Stone, *Barr's 'Investigation of Investigators' Sparks Fears for Efforts to Thwart Russia*, GUARDIAN (June 16, 2019, 12:00 AM), <https://www.theguardian.com/us-news/2019/jun/16/william-barr-meller-report-investigation-2020-election> [<https://perma.cc/NMJ6-YKQ9>].

46. See Kevin Breuninger & Dan Mangan, *Trump Praises AG William Barr After Roger Stone Sentencing Reversal Leads 4 Prosecutors to Quit*, CNBC (Feb. 12, 2020, 10:42 AM), <https://www.cnn.com/2020/02/12/trump-praises-william-barr-after-roger-stone-sentencing-reversal.html> [<https://perma.cc/ZT3M-KL87>].

47. DOJ Alumni (@DOJAlumni), *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone*, MEDIUM (Feb. 16, 2020), <https://medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-c2cb75ae4937> [<https://perma.cc/9X2B-TMAM>]. The letter is signed by 2,689 alumni. *Id.*

48. Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker, House of Representatives, and Eliot L. Engel, Adam B. Schiff, and Elijah E. Cummings, Chairmen, House of Representatives (Oct. 8, 2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/7cb26618-e770-45ef-9c45-bdd5554ce201/note/9608d380-f0df-4e07-8b08-8f326b723626.pdf#page=1> [<https://perma.cc/JZ4Y-V7WT>] [hereinafter Letter from Pat A. Cipollone to Nancy Pelosi]; see also Bob Bauer, *The Cipollone Letter: Trouble in the White House Counsel's Office*, LAWFARE (Oct. 11, 2019, 1:24 PM), <https://www.lawfareblog.com/cipollone-letter-trouble-white-house-counsels-office> [<https://perma.cc/53CT-44Y9>].

49. See Letter from Pat A. Cipollone to Nancy Pelosi, *supra* note 48.

50. Philip Bump, *Trump's Legal Team Begins Its Impeachment Trial Defense in Very Trumpy Form*, WASH. POST (Jan. 21, 2020, 3:29 PM), <https://www.washingtonpost.com/politics/2020/01/21/trumps-legal-team-begins-its-impeachment-trial-defense-very-trumpy-form/> [<https://perma.cc/4D4P-JGLD>].

trial.⁵¹

None of these scenarios are protected by privilege if their purpose was to further a criminal or fraudulent scheme.⁵² Even if not used to further the scheme, the claim of privilege does not allow any of these attorneys to avoid revealing the fact that the conversations occurred, as privilege protects only the content of the conversations.⁵³ And, each of these scenarios fit squarely within the exceptions to confidentiality.⁵⁴

What is more interesting is that the privilege President Trump claims, particularly concerning communications with government attorneys, does not belong to him personally.⁵⁵ One of the changes to the rules governing lawyers, inspired by John Dean's collaboration with Richard Nixon, is a reminder to lawyers that when they represent institutions, the client is the organization—not the leader of the organization.⁵⁶ Thus, the privilege belongs to us, the American people, not the President, and is for the purpose of protecting the nation and its security, not the personal affairs of the President.⁵⁷ It is not his to invoke and is instead ours to waive. If we, through our proxies in the legislature, want information from the White House Counsel or the Department of Justice, and it is not a matter of national security, they should give it to us.⁵⁸

When Giuliani is given government information without a proper government role or clearance, the act of sharing the information may itself be a crime. Trump's violation of his duty to protect the country's secrets by revealing them to an outsider constitutes a waiver, both of our privileges and his personal privilege as

51. See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2018).

52. See FED. R. EVID. 501; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (AM. LAW INST. 2000).

53. Jackie Unger, *Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege*, A.B.A. (Oct. 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/ [<https://perma.cc/HER8-RFGH>].

54. See MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

55. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1386–87 (1974) (“The Judicial Branch, when it needs evidence, should have the power to obtain it. The Legislative Branch, when it needs information in order to perform its duties, should also have power to obtain it. Yet the Executive, when disclosure of information will impede the performance of its duties, should have power to withhold it. The third inference cuts across the first and second. In any given situation either the first or second, or the third, must yield.”); Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 80 (2011). Neither power—Congress's to investigate matters within its legislative power and punish with contempt of Congress those who fail to comply, or the Executive's to maintain confidentiality of executive documents which would adversely affect the ability of the President to carry out his constitutionally assigned functions—is absolute. *Id.*

56. Cox, *supra* note 56, at 1404 (“[N]othing appears which even approaches a solid historical practice of recognizing claims of executive privilege based upon an undifferentiated need for preserving the secrecy of internal communications within the Executive Branch.”).

57. Peterson *supra* note 56, at 96–98. The Supreme Court recognized a right of the President to protect the confidentiality of certain types of Executive Branch documents related to state secrets and national security, containing deliberative communications between the President and his advisors who assist the President in performing his presidential duties, and related to open investigations that may compromise law enforcement. *Id.* at 96–97.

58. See 18 U.S.C. § 371 (2020) (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”).

a client.⁵⁹ Any claims of privilege or confidentiality by the President are moot. Trump and Giuliani operate in a scenario that closely mirrors that of *The Godfather*, outside the bounds of protection of privilege and confidentiality and into the realm of criminal conspiracy. Being an attorney, even the President's attorney, does not equal being an agent of the Executive Branch.

The go-to defense of the Trump Administration to disclosure, wielded by both the White House and the Justice Department, is executive privilege.⁶⁰ This privilege does not apply.⁶¹ The purpose of executive privilege is to protect national security, not the personal interests of the president.⁶² It should only be invoked when revealing the information will impair the functioning of the government.⁶³ Barr and Cipollone's use of the executive privilege has, thus far, served the opposite purpose. It has blocked the Legislative Branch from its proper role and prolonged the administration of justice.⁶⁴

When lawyers act as Giuliani, Barr, and Cipollone have in their assistance of Donald Trump, they may face criminal prosecution and discipline.⁶⁵ Crossing the line from advising a client to cooperating in criminal activity is a crime.⁶⁶ An attorney who acts as John Dean acted in his role as White House Counsel, with loyalty to Richard Nixon instead of the nation, may face disbarment in addition to criminal charges.⁶⁷ It is possible that Giuliani, Barr, and Cipollone will face the same fate as John Dean. But, they may mitigate the harm to themselves and the nation by blowing the whistle.⁶⁸

A license to practice law does not shield an attorney from being held personally liable or culpable for crimes.⁶⁹ Mere communication with a lawyer does not make a conversation a protected secret.⁷⁰ Lawyers do not exist to prolong schemes. Instead, our laws encourage attorneys to consider the welfare of others in extreme circumstances when their clients use legal counsel to cause harm.⁷¹ The attorneys acting in the role of Attorney General and White House Counsel should

59. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 (AM. LAW INST. 2000).

60. See, e.g., Jim Acosta, *Trump's Impeachment Trial Team Sees "Significant" Executive Privilege Issues over Potential Bolton Testimony*, CNN (Jan. 10, 2020, 8:26 PM), <https://www.cnn.com/2020/01/10/politics/trump-john-bolton-privilege/index.html> [<https://perma.cc/Q2SX-32PR>].

61. See Peterson *supra* note 56, at 99 (explaining how courts have not treated claims of executive privilege as absolute and instead engage in a balancing test of the President's interests and the interests of Congress).

62. See *id.* at 96; see also Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1570-71 (2002); David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1082 (2007).

63. Peterson, *supra* note 56, at 100.

64. See Cox, *supra* note 56, at 1385.

65. See Curriden, *supra* note 9, at 38; MODEL RULES OF PRO. CONDUCT r. 1.2(d), 1.6, 3.3(b) (AM. BAR ASS'N 2018).

66. See Curriden, *supra* note 9, at 38.

67. See Dean & Robenalt, *supra* note 9, at 23; Curriden, *supra* note 9, at 44.

68. See Curriden, *supra* note 9, at 41.

69. See *id.* at 38; MODEL RULES OF PRO. CONDUCT r. 1.2(d), 1.6, 3.3(b) (AM. BAR ASS'N 2018).

70. Unger, *supra* note 54.

71. See MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

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remember their duties to the nation, their ethical obligations, and their proper roles under the law.